



REPUBLIC OF KENYA



**Shikoto v Opati & 3 others (Civil Appeal (Application) E006 of 2024)
[2025] KECA 1907 (KLR) (7 November 2025) (Ruling)**

Neutral citation: [2025] KECA 1907 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT KISUMU
CIVIL APPEAL (APPLICATION) E006 OF 2024
MSA MAKHANDIA, HA OMONDI & AO MUCHELULE, JJA
NOVEMBER 7, 2025**

BETWEEN

WYCLIFFE LUVEMBE SHIKOTO APPELLANT

AND

ELIZABETH ACHITSA OPATI 1ST RESPONDENT

MARTIN CHIBOLE 2ND RESPONDENT

JIMMY CHIBOLE 3RD RESPONDENT

STEPHEN BAHATI MUSINDAI 4TH RESPONDENT

(Being an Application for Stay of Execution pending the hearing and determination of an Appeal from the Judgment of the Environment and Land Court at Kakamega (Obungo, J.) dated 25th October, 2023 in ELC Appeal No. E042 of 2022)

RULING

1. Before the Court is an application dated 9th December, 2024, brought by the applicant, Wycliffe Luvembe Shikoto, pursuant to Order 42 Rule 6 of the Civil Procedure Rules and all other enabling provisions of the law. The applicant seeks a stay of execution of the judgment and decree issued by the Environment & Land Court, (“ELC”), at Kakamega, on 2nd November 2023, pending the hearing and determination of his appeal. He further prays for conservatory orders to preserve all that piece or parcel of land known as the Isukha/Shirere/5527, (“the suit property”), and that the costs of the application be reserved until the outcome of the appeal.
2. The brief circumstances leading to this application are that the applicant sued the respondents in the Chief magistrates’ court at Kakamega over ownership and possession of the suit property. He sought declaratory reliefs and injunctive orders against the respondents in pursuit of his interest in the suit property. However, the Chief Magistrate’s Court dismissed the suit on the basis that it lacked the



pecuniary jurisdiction to hear and determine the dispute. The decision was pursuant to an application mounted by the respondents in that regard. The suit property had been valued at Kshs 32 million whereas the pecuniary jurisdiction of the Chief Magistrate's Court was Kshs 20 million.

3. Aggrieved by the ruling and order aforesaid, the applicant lodged an appeal to the ELC. Upon hearing the appeal, the ELC upheld the Chief magistrate's decision. However, it substituted the order dismissing the suit with one of, striking it out. Dissatisfied with the judgment and decree of the ELC, the applicant filed a second appeal in this Court.

4. Pursuant to the appeal, the applicant filed the instant application.

It is supported by the grounds on its face and the supporting affidavit sworn by the applicant. The core of the applicant's case is that a Notice to Show Cause why he should not be committed to civil jail in execution of the decree, specifically on the order for costs had been issued against him. That the hearing had been scheduled for 18th March 2025, and if allowed to proceed may result in his committal to civil jail. If that were to happen, it would render his pending appeal nugatory. The applicant maintains that his appeal raises arguable issues deserving this Court's consideration.

5. Another plank of the application is that the applicant had deposited a sum of Kshs.250,000/= towards the satisfaction of the decree, yet the execution is being pursued on the entire decretal sum of Kshs.859,635/= instead of Kshs.609,635/=. Additionally, the applicant alleges that the 1st to 3rd respondents were dormant parties in the lower court proceedings but have nonetheless been awarded costs which was unfair. He emphasizes that unless the stay and conservatory orders are granted, he is likely to suffer substantial prejudice including loss of the suit property and exposure to civil jail.

6. The application was opposed by the respondents who filed joint grounds of opposition in which they contended, that the application was procedurally flawed, lacks merit, and should be dismissed in limine having invoked the wrong provisions of the law. They asserted that the application is untenable, amounts to an abuse of the court process, and has in any event, been overtaken by events. They further urge the Court to find that the application is not supported by sufficient cause and that the orders sought are contrary to law.

7. At the plenary hearing of the application, the applicant appeared in person while Mr. Mulama, learned counsel appeared for the respondents. The applicant opted to rely wholly on his written submissions in which he merely reiterated and expounded on the grounds and affidavit in support of the application. We therefore need not rehash the same.

8. Suffice to add that in abid to emphasize the need to preserve the subject matter of appeal and prevent the appeal from being rendered academic through premature execution, the applicant cited the following authorities: Nicholas Stephen Okaka & Charity Njoki v. Alfred Waga Wesonga (Siaya Civil Appeal No. E003 of 2022), Kenya Airports Authority v. Otieno, Ragot & Co. Advocates (Supreme Court Petition No. E011 of 2023), Public Service Commission & 72 others v. Okiya Omtatah & 4 others [eKLR], and Solomon Mwangi v. Mary Muthue Kasivu (Machakos Civil Appeal No. E268 of 2023). In the ultimate, the applicant prayed the application be allowed in its entirety.

9. Counsel for the respondent in opposition to the application, argued that the applicant had not met the legal threshold for grant of stay of execution, contending that there was no sufficient cause or imminent risk of prejudice warranting the reliefs sought. Counsel submitted that the application had, in any event been brought under the wrong provisions of the law since Order 42 Rule 6 is inappropriate in applications of this nature in this Court. Emphasizing the finality of the High Court's decision, counsel asserted that the orders sought amount to staying a negative order, which is impermissible in law. Counsel relied on the case of Western College of Arts and Applied Sciences v. Oranga & Others



[1976] KLR 63 to reinforce the principle that a negative order is incapable of being stayed. Further, citing the case of Kenya Hotel Properties Ltd v. Willesden Investments Ltd [2007] eKLR, counsel submitted that an arguable appeal alone is insufficient without demonstration of irreparable harm that may be occasioned to the applicant in the event such order is denied. Based on these authorities, counsel urged the Court to dismiss the application with costs.

10. The applicant seeks a stay of execution of the ruling and orders as well as conservatory protection over the suit property. We note however, and agree with counsel for the respondents that the application before us has been brought under the wrong provisions of the law, that is, pursuant to Order 42 Rule 6 of the Civil Procedure Rules. The law that invokes this Court's jurisdiction in applications of this nature is Rule 5(2) (b) of the Court of Appeal Rules. Despite this jurisdictional and foundational omission, and given that the applicant is a layman pro se at that, for justice to be seen to be done, we shall excuse the omission and proceed to determine the application on the merits as we can tell from the prayers the intent and essence of the application.
11. As already stated, this Court derives its jurisdiction to entertain the present application from the provisions of Rule 5(2)(b) of the Court of Appeal Rules. Under this provision, the Court is empowered to grant an order of stay of execution, injunction, or stay of proceedings, pending the hearing and determination of an intended or appeal. The principles for the grant or denial of this kind of application were well articulated and settled in the case of Stanley Kangethe Kinyanjui v. Tony Ketter & 5 Others [2013] eKLR. However, the upper most considerations are that the appeal or intended appeal is arguable (that is, not frivolous), and that if the stay is not granted, the appeal, if successful, will be rendered nugatory.
12. On arguability of the appeal, the applicant's concerns touch on procedural fairness, perceived oversight of a financial deposit, and potential proprietary harm. However, the record shows that the ELC's determination was confined solely on the issue of jurisdiction and did not affirm or issue any positive orders capable of execution. The trial court dismissed the suit and on appeal the ELC merely substituted the order of dismissal with order striking out the suit instead. Thus, allegations relating to decretal sums and loss of property appear misconceived and far detached from the decision under challenge. In Trust Bank Limited & Another v. Investec Bank Limited & 3 Others [2000] eKLR, the Court emphasized that for an appeal to be arguable, it must raise more than perceived procedural missteps; it must disclose issues warranting legal interrogation. This threshold has not been met in our view.
13. As to the second limb which is the nugatory aspect, there is no evidence of real or imminent prejudice that would defeat the purpose of the appeal. No executable order has been demonstrated, and the apprehension of committal to civil jail, while emotionally compelling, lacks a lawful or factual anchor in the decree emanating from the jurisdictional ruling. In Republic v. Kenya Anti-Corruption Commission & 2 Others [2009] KLR 31, the Court held that speculative harm is insufficient to justify stay orders under Rule 5(2)(b). Moreover, the alleged deposit of Kshs.250,000/= is not shown to have been part of the factual matrix before the High Court. Likewise, the claim that the integrity of the property is under threat was not substantiated with credible evidence.
14. Based on the foregoing analysis, it is evident that the judgment and decree of the ELC was strictly confined to affirming the trial court's finding on jurisdiction. No positive, executable orders were made. Essentially therefore, the judgment and decree sought to be stayed is the nature of a negative decree incapable of being stayed. See *Western College of Arts and Applied Sciences v. Oranga & Others* (supra).



15. Consequently, the Notice of Motion dated 9th December, 2024, fails to satisfy the dual test for grant of relief under Rule 5(2)(b). Accordingly, the application is dismissed with costs to the respondents.
Dated and delivered at Kisumu this 7th day of November, 2025.

ASIKE-MAKHANDIA

JUDGE OF APPEAL

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H. A. OMONDI

JUDGE OF APPEAL

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A.O. MUCHELLULE

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

